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In the Supreme Court of the United States

OCTOBER TERM, 1971

No.

INTERSTATE COMMERCE COMMISSION, MATTHEW PAOLO, DIRECTOR, BUREAU OF ACCOUNTS, AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

BURLINGTON NORTHERN, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Interstate Commerce Commission, Matthew Paolo, and the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on January 31, 1972.

OPINIONS BELOW

The findings of fact and conclusions of law of the district court (Appendix A, *infra*, pp. 1a–12a) are reported at 323 F. Supp. 273.[1] The opinion of the court

[1] The district court's order granting summary judgment for respondent is set forth at pp. 111–112 of the Appendix in the

of appeals (Appendix B, *infra*, pp. 13a–26a), and the order of the court regarding the suggestion for rehearing *en banc* and the statement of the judges who would have granted such rehearing (Appendix C, *infra*, pp. 27a–31a), are not yet reported.

JURISDICTION

The judgment of the court of appeals (Appendix D, *infra*, pp. 32a–33a) was entered on January 31, 1972, and a suggestion for rehearing *en banc* was denied on May 17, 1972. On April 24, 1972, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including June 29, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 20(5) of the Interstate Commerce Act (49 U.S.C. 20(5)), which empowers the Interstate Commerce Commission to inspect "any and all accounts, books, records, memoranda, correspondence, and other documents" of railroads, covers only records relating to the maintenance of a uniform system of accounts and to the explanation or understanding of required accounting entries, and thus does not authorize the Commission to inspect budget forecasts of railroads.

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court of appeals; its oral opinion announced December 22, 1970, is set forth at pp. 96–97 thereof. We are lodging a copy of that Appendix, hereinafter referred to as "C.A. App.," with the Clerk of this Court.

STATUTE INVOLVED

Section 20(5) of the Interstate Commerce Act, as amended, 49 U.S.C. 20(5), provides:

> The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers and their lessors, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys, and it shall be unlawful for such carriers or lessors to keep any accounts, records, and memoranda contrary to any rules, regulations, or orders of the Commission with respect thereto. The Commission or any duly authorized special agent, accountant, or examiner thereof shall at all times have authority to inspect and copy any and all accounts, books, records, memoranda, correspondence, and other documents, of such carriers, lessors, and associations, and such accounts, books, records, memoranda, correspondence, and other documents, of any person controlling, controlled by, or under common control with any such carrier, as the Commission deems relevant to such person's relation to or transactions with such carrier. The Commission or its duly authorized special agents, accountants, or examiners shall at all times have access to all lands, buildings, or equipment of such carriers or lessors, and shall have authority under its order to inspect and examine any and all such lands, buildings, and equipment. Such carriers, lessors, and other persons shall submit their accounts, books, records, memoranda, correspondence, and other

documents for the inspection and copying authorized by this paragraph, and such carriers and lessors shall submit their lands, buildings, and equipment to inspection and examination, to any duly authorized special agent, accountant, or examiner of the Commission, upon demand and the display of proper credentials.

STATEMENT

Burlington Northern, Inc. ("Burlington"), a major railroad, initiated this action for a declaratory judgment and injunctive relief concerning a formal demand by the Interstate Commerce Commission under Section 20(5) of the Interstate Commerce Act to inspect and examine Burlington's current budget forecasts, including cash flow and income forecasts. The district court concluded that the forecasts were not subject to inspection under Section 20(5), and granted summary judgment for Burlington. The court of appeals affirmed.

1. In June 1970, after the Penn Central Railroad announced that it was filing a petition in bankruptcy, the Subcommittee on Surface Transportation of the Senate Commerce Committee conducted hearings to consider, among other things, legislation to provide financial assistance to certain railroads (Appendix B, *infra*, pp. 14a–15a; C.A. App. 114–116). During the hearing on June 23, 1970, the Subcommittee Chairman, Senator Hartke, asked Commissioner Tuggle of the Commission to obtain and submit to the Subcommittee financial information, including financial forecasts, from railroads which were prospective applicants for loan guarantees under the proposed legislation (Ap-

pendix B, *infra*, pp. 15a–16a; C.A. App. 117–120). Subsequently (in July 1970) the Commission requested financial forecasts from seventy-three major railroads; thirty-seven railroads furnished the requested information, but the others, including Burlington, did not (Appendix C, *infra*, p. 28a, n. 1).

In August 1970, published news reports indicated that Burlington's currently declared dividends exceeded its earnings. According to these reports, Burlington lost about $1,115,000, and declared dividends totalling about $8,615,000 during the first quarter of 1970, and earned $4,547,000 and again declared dividends totalling $8,615,000 in the second quarter (Appendix C, *infra*, p. 28a, n. 1; C.A. App. 122, 175).

The Commission notified Burlington in September 1970 that it was concerned that the gap between the dividends declared and Burlington's earnings might adversely affect the company's working capital and cash position, and requested "copies of your cash flow and income forecasts for the year 1970 and, if developed, for the year 1971, particularly your plans to pay debt obligations coming due" (C.A. App. 128–129). Although Burlington agreed to furnish some information, it declined to furnish the income and cash flow forecasts on the basis of a legal opinion that it was not required by the Act to do so (Appendix C, *infra*, p. 28a, n. 1; C.A. App. 130). The Commission then issued to Burlington a "Formal Demand for Examination of Records" under Section 20(5), requesting inspection and examination of 1970 and current budget forecasts, including income and cash flow forecasts; all analyses, working papers, preliminary

studies, and interpretative material relating to such forecasts; and all documents showing variations between such forecasts and actual performance for each month and quarter of 1970. The demand pointed out that Burlington would be subject to possible penalties under Section 20(7) of the Act if it did not comply. (Appendix B, *infra*, pp. 17a–18a; C.A. App. 103.)

2. Burlington did not comply, but instead brought this action for a declaration that Section 20(5) did not authorize the Commission to inspect the forecasts (C.A. App. 15, 21).

The district court held that the forecasts were not subject to inspection under Section 20(5). The court of appeals affirmed. It relied on *United States* v. *Louisville & Nashville Railroad Co.*, 236 U.S. 318, where this Court held that the Commission's inspection power under Section 20, which then extended only to "accounts, records, and memoranda," did not apply to correspondence sent to or received by a railroad. Pointing out that *L&N* "confined the Commission's power of compulsory inspection to narrow limits," the court below concluded that subsequent amendments to Section 20 "did not alter the basic design and purpose of section 20," so that the Commission's inspection powers under that section "were still required to relate to the maintenance of a uniform system of accounts, and to the explanation or understanding of required accounting entries" (Appendix B, *infra*, pp. 22a, 24a).

The government's suggestion for rehearing *en banc* was denied by a divided court (four to four, with

Judge McGowan not participating). Judge Leventhal, joined by Chief Judge Bazelon and Judges Wright and Robinson, stated that "[t]he question is important, and the panel decision is so doubtful that we think it should be vacated and reconsidered en banc" (Appendix C, *infra*, p. 31a).

REASONS FOR GRANTING THE WRIT

This case presents an important question concerning the Commission's investigative authority under the Interstate Commerce Act. The court of appeals' narrow interpretation of Section 20(5) is inconsistent with the broad language of that section, fails to give proper significance to the expansion of the statute that Congress made after the *L&N* decision, and breaks sharply with the well-settled principle that the investigative power of administrative agencies should be broadly construed. If permitted to stand, the decision will have a substantial effect on the Commission's ability to perform its duties under the Act.

1. Section 20(5) provides in relevant part that the Commission "shall at all times have authority to inspect and copy any and all accounts, books, records, memoranda, correspondence, and other documents" of railroads. Nothing in this language suggests that it applies only to material relating to accounting systems prescribed by the Commission. On the contrary, the broad wording of this provision—which authorizes inspection of "any and all * * * other documents"—in terms permits the Commission to inspect any material pertaining to its regulatory functions.

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The financial forecasts sought here pertain to the Commission's responsibilities. The Commission made its request in connection with proposed legislation to deal with financially troubled railroads and at a time when Burlington's dividends were exceeding its earnings, and the forecasts were essential to the Commission's investigation of abuses and problems that might call in part for use of existing administrative authority and in part for new legislation.

2. Contrary to the conclusion of the court of appeals (Appendix B, *infra*, pp. 25a–26a), the history and background of the statute confirm that it permits inspection of the forecasts.

As originally enacted in 1887, Section 20 gave the Commission no powers of inspection (see Section 20 of the Act of February 4, 1887, 24 Stat. 386–387). In 1906, however, Congress amended Section 20 to provide that: "The Commission shall at all times have access to all accounts, records and memoranda kept by carriers subject to this Act, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission * * *" (Section 7 of the Hepburn Act of 1906, 34 Stat. 594).

In the *L&N* case, decided in 1915, this Court held that the Commission's inspection powers under Section 20 did not cover correspondence. The Court pointed out that "railroads are not allowed to keep any other [accounts, records and memoranda] than those prescribed by the Commission," and concluded that the primary object of Section 20 was "to establish a uniform system of accounting and bookkeep-

ing, and to have an inspection thereof" (236 U.S. at 333, 335). "There is nothing from the beginning to the end of the section to indicate that Congress had in mind that it was making any provisions concerning the correspondence received or sent by the railroad companies" (236 U.S. at 335).

The response of Congress to the *L&N* decision was to amend Section 20 in 1920 by expanding the Commission's inspection authority to cover "all documents, papers, and correspondence now or hereafter existing, and kept or required to be kept by carriers * * *" (Section 435 of the Transportation Act of 1920, 41 Stat. 493). This amendment broadened the provision in two respects: it specifically authorized the Commission to inspect correspondence, and it also permitted inspection of documents actually "kept" as well as documents "required to be kept." Congress thus rejected the ruling in *L&N* that the Commission could inspect only records which carriers were required to maintain under the Commission's prescribed uniform accounting system.

In 1940 Congress again amended Section 20(5), by Section 13(a) of the Transportation Act of 1940, 54 Stat. 917, to broaden it further to its present form, which not only covers "all" accounts, books, records, memoranda and correspondence, but also "other documents."

There is nothing in the history of this progressive broadening of the Commission's inspection power that even suggests, let alone shows, that Congress nevertheless intended to retain the restrictive interpretation of the prior law in *L&N* that the agency may

examine only records relating to the maintenance of a uniform system of accounts.

3. The narrow interpretation by the court of appeals of the Commission's inspection power is out of harmony with the more recent trend of decisions concerning the scope of the investigatory authority of regulatory agencies. See *United States* v. *Morton Salt Co.*, 338 U.S. 632, 651–654; *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 208–214; *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 506–510; see, also, *Federal Trade Commission* v. *Crafts*, 355 U.S. 9, reversing *per curiam* 244 F. 2d 882 (C.A. 9); *Civil Aeronautics Board* v. *Hermann*, 353 U.S. 322, reversing *per curiam* 237 F. 2d 359 (C.A. 9).[2] In these and other cases this Court has emphasized that the investigative powers of administrative agencies should be broadly construed to permit fully effective regulation, and has disapproved the restrictive approach taken by the court below. See, *e.g.*, *United States* v. *Morton Salt Co.*, *supra*, 338 U.S. at 642–643, 652.

Indeed, inspection of the forecasts involved here might be permissible even under the *L&N* decision.

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[2] Professor Davis has pointed out that "During the decade of the 1940's, constitutional principles concerning the administrative power of investigation were largely turned right around backwards * * *. A new set of principles has been established, built on the basic idea that the administrative power of investigation must be fully effective." *1 Davis, Administrative Law Treatise*, Sec. 3.01, p. 159; *see, also, id.* 1970 Supp., Sec. 3.01, p. 90.

The Court there indicated that Section 20 "may be * * * broad enough * * * to authorize an inspection of accounts, records and memoranda for which no form has been prescribed by the Commission * * *" (236 U.S. at 335). The Commission has not prescribed forms for financial forecasts, and Section 20(5) should be interpreted to permit inspection of them.

4. The decision below, if permitted to stand, would have a significant adverse effect upon the proper performance of important aspects of the Commission's work. Section 20(5) has long been the principal basis for routine Commission investigations concerning numerous aspects of the railroad industry, which frequently are unrelated to the uniform accounting system specified by the Commission. It is often important—as in this case—that the Commission obtain quickly the information sought, and railroads generally have complied with an informal Commission request without the issuance of a formal demand or the necessity of judicial enforcement. The Commission advises that since the decision in the district court (which the court of appeals affirmed), carriers in reliance thereon have refused to furnish not only financial forecasts, but also other types of documents that the Commission has requested under Section 20(5).[3] The decision below has disrupted this established administrative practice, to the prejudice of the proper performance of the Commission's responsibilities.

[3] An illustrative listing of Commission requests and responses thereto is set forth at Appendix E, *infra*, pp. 34a–35a.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ERWIN N. GRISWOLD,
Solicitor General.

HARLINGTON WOOD, JR.,
Acting Assistant Attorney General.

WM. TERRY BRAY,
Assistant to the Solicitor General.

MORTON HOLLANDER,
RAYMOND D. BATTOCCHI,
Attorneys.

JUNE 1972.

APPENDIX A

In the United States District Court for the District of Columbia

Civil Action No. 3471–70

BURLINGTON NORTHERN INC., PLAINTIFF

v.

INTERSTATE COMMERCE COMMISSION AND MATTHEW PAOLO, DIRECTOR, BUREAU OF ACCOUNTS, DEFENDANTS, AND UNITED STATES OF AMERICA, INTERVENING DEFENDANT

Findings of Fact and Conclusions of Law

(Filed January 13, 1971)

This cause having come before the Court on December 22, 1970, for hearing on cross motions for summary judgment filed on behalf of plaintiff, Burlington Northern Inc. and on behalf of defendants and the intervening defendant; and the Court having considered said motions, the affidavits and other materials filed in support of and in opposition to each motion, and the memoranda and oral argument submitted by counsel for each of the parties, the Court makes the following findings of fact and conclusions of law:

1. Plaintiff Burlington Northern Inc. is a Delaware Corporation having its principal place of business at St. Paul, Minnesota. Burlington Northern Inc. is a common carrier by railroad within the meaning of

Section 1(1) of the Interstate Commerce Act, 49 U.S.C. § 1(1), and, accordingly is subject to the regulations provided in Part I of that Act (49 U.S.C. §§ 1–26).

2. W. N. Ernzen is a resident of the State of Minnesota, and is Vice President-Finance of Burlington Northern Inc. In that capacity, he is the senior corporate officer having direct responsibility for the creation and custody of the documentary materials which are the subject of this suit.

3. Defendant Interstate Commerce Commission is an agency of the United States, created pursuant to Section 11 of the Interstate Commerce Commission Act (49 U.S.C. § 11), and having its principal offices of business at Washington, D.C. By statute (49 U.S.C. § 12(1)), the Commission is charged with the responsibility for executing and enforcing the provisions of Part I of the Interstate Commerce Act, and is authorized to request that any United States Attorney institute and prosecute proceedings necessary to enforce the provisions of Part I of the Act and for punishment of all violations thereof. Upon request of the Commission, any United States Attorney is required to institute and prosecute such proceedings.

4. Under Section 20(5) of the Interstate Commerce Act, the Commission is authorized to prescribe the form of any and all accounts, records, and memoranda to be kept by carriers, and to inspect and copy "accounts, books, records, memoranda, correspondence, and other documents of such carriers." Section 20(9) authorizes the Attorney General at the request of the Commission to seek a writ of mandamus to compel compliance with Section 20(5). Section 20(7)(a) provides for a forfeiture of not to exceed $500 per day if a carrier fails or refuses to submit the materials covered by Section 20(5) to the Com-

mission or its authorized agents, accountants, or examiners, to be recovered in a proceeding instituted in the name of the United States pursuant to Sections 20(7)(e), 16(9), and 16(10) of the Act.

5. Defendant Matthew Paolo, a resident of the State of Maryland, is Director, Bureau of Accounts, Interstate Commerce Commission, and, in that capacity, is the administrative official charged with carrying out the Commission's responsibilities under Section 20 of the Interstate Commerce Act (49 U.S.C. § 20) in accordance with the directions of the Commission.

6. On or about September 4 and September 25, 1970, Matthew Paolo, in his capacity as Director, Bureau of Accounts, Interstate Commerce Commission, and relying upon the provisions of Section 20(5) of the Interstate Commerce Act, requested Burlington Northern Inc. to furnish to the Commission certain materials relating to budget forecasts. The request dated September 4, 1970, recited that the inquiry related to certain dividend action taken by Burlington Northern Inc. and sought forecast data for the years 1970 and 1971. The request dated September 25, 1970, related to a request for forecast information directed to 73 railroads on July 17, 1970. Burlington Northern Inc. responded to this inquiry on August 4, 1970, but in the September 25 letter, Mr. Paolo sought further details as to forecasts for the year 1970 and for the fourth quarter of 1970. Plaintiffs objected to the production of forecasts, contending, *inter alia,* that the materials did not constitute "accounts, books, records, memoranda, correspondence, and other documents" within the meaning of Section 20(5), and that the Commission had no lawful authority to demand their production.

7. On or about October 30, 1970, plaintiffs, in support of their objections, submitted to defendant Paolo

an opinion of their counsel, Anthony Kane, Vice President—Law, a copy of which is attached to the amended verified complaint as Exhibit A. At that time, plaintiffs furnished to defendant Paolo excerpts from meetings of the Board of Directors of Burlington Northern Inc. on February 25, 1970, June 15, 1970 and August 21, 1970 at which dividend action was taken. The excerpts consisted of the resolutions passed by the Board and the financial statements presented to the Board. Plaintiffs also offered to provide the Commission with monthly financial reports (as distinguished from budget forecasts) providing the same detail as now furnished in quarterly reports filed with the Commission.

8. On November 18, 1970, Thomas A. Stachowicz and Raymond A. Youngbauer, representing themselves as duly-authorized Auditors of the Commission, and bearing credentials in the form prescribed by the Commission (49 C.F.R. § 1000.5(d)), served upon Mr. W. N. Ernzen a "Formal Demand For Examination of Records," a copy of which is attached to the amended verified complaint as Exhibit B, demanding, pursuant to Section 20(5), to inspect and examine the following materials:

> (1) Burlington Northern, Inc., 1970 budget forecast including but not limited to items pertaining to cash flow forecast and income forecast, together with associated working papers and interpretative material including but not limited to summarizations of any phase of the forecast.
>
> (2) Burlington Northern, Inc., most current budget forecast including but not limited to items pertaining to cash flow forecast and income forecast, together with associated working papers and interpretative material including but not limited to summarizations of any phase of the foregoing forecast.

(3) Burlington Northern, Inc., all analyses, working papers, preliminary studies, interpretative material and summarizations presently on hand and in the making as the subject matter for the next budget forecast of the nature indicated in (1) and (2) above.

(4) All documents showing variances between the Burlington Northern, Inc., budget forecasts and actual performance for each month and/or quarter of the calendar year 1970.

9. The "Formal Demand For Examination of Records" stated in part:

> This demand is in the nature of a continuing demand and shall continue for each and every day until such time as the aforesaid records are submitted for examination to the undersigned pursuant to this demand.
>
> Your attention is specifically directed to Section 20(7)(a) of the Interstate Commerce Act which provides that in case of failure or refusal on the part of carriers or other persons subject to the provisions of this Act to submit for examination the aforesaid documents, the carrier and/or such persons shall forfeit to the United States not to exceed $500.00 for each such offense and for each day during which such failure or refusal continues. This continuing demand shall terminate upon receipt of advice from Burlington Northern, Inc. that it and its Vice President—Finance, W. N. Ernzen will immediately comply with the demand as aforesaid * * *

10. Messrs. Stachowicz and Youngbauer, in serving the "Formal Demand For Examination of Records," were acting at the direction and under the control of defendant Paolo. The "Formal Demand For Examination of Records" recites that it is based upon Section 20(5) of the Act, and it has not been issued pursuant to an order of the Interstate Commerce Commission.

11. On November 25, 1970, Burlington Northern Inc. and W. N. Ernzen filed a verified complaint for a declaratory judgment and for injunctive relief seeking primarily a declaration that the materials demanded in the "Formal Demand For Examination of Records" served November 18, 1970, do not constitute "accounts, books, records, memoranda, correspondence, and other documents" within the meaning of Section 20(5) of the Interstate Commerce Act, and that the failure or refusal of plaintiffs to furnish such materials to the Interstate Commerce Commission or its duly authorized representatives does not constitute a violation of said section or subject plaintiffs to the forfeitures prescribed in Section 20(7)(a) of the Act. On December 8, 1970, the Interstate Commerce Commission filed its answer praying that the Court enter an order dismissing the complaint. On December 10, 1970, the United States of America, acting at the request of the Commission, moved for leave to intervene as a defendant in this proceeding and to assert a counterclaim under Sections 20(5), 20(7), and 20(9) of the Act, declaring plaintiffs' refusal to comply with the demand to be a violation of Sections 20(5) and 20(7), commanding plaintiffs to comply with the demand, and assessing against plaintiffs a forfeiture of $500 per day from November 18, 1970, until the demand was satisfied. By stipulation of the parties, the motion to intervene was granted on December 11, 1970, and plaintiffs filed a reply to the counterclaim on December 14, 1970. On December 10, 1970, defendants filed a motion for summary judgment. On December 18, 1970, plaintiffs filed a cross motion for summary judgment. On December 22, 1970, by agreement of the parties, the Court entered a Consent Order dismissing both the complaint filed on behalf of W. N. Ernzen and the counterclaim asserted against him.

12. The forecast materials sought by the Formal Demand are not required to be prepared or retained by Burlington Northern pursuant to regulations of the Commission or the provisions of the Interstate Commerce Act.

13. The forecast materials sought by the Formal Demand are not records of historical facts or past transactions but pertain to budget forecasts of Burlington Northern, including items relating to cash flow forecasts and income forecasts.

14. The budget forecasts, including income and cash flow forecasts, and associated documentary materials, sought by the Formal Demand are not in the same class as other materials and estimates submitted to the Commission by Burlington Northern Inc. and other railroads as a part of their regular accounting and reporting procedures.

15. The forecast materials sought by the Formal Demand are not public documents and are not furnished to the public.

16. The affidavits submitted by Burlington Northern Inc. and executed by accounting officers of Burlington Northern Inc., the accounting officers of two of its subsidiaries, the Colorado and Southern Railway Company and the Fort Worth and Denver Railway Company, and accounting officers of two nonaffiliated railroads, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Southern Railway System, each state that to the affiant's knowledge these railroads (and the predecessors of Burlington Northern Inc.) have not been requested to furnish, and have not furnished, to auditors employed by the Commission budget forecasts, including income and cash flow forecasts of the kind sought in the Formal Demand. The reply affidavit filed on behalf of defendants states, with respect to each of these railroads, that although

all aspects of the present request may not have been covered in the past, it is probable that some requests for budget forecasts and cash flow forecasts were made in the normal course of field examinations of the accounting records of these carriers, that such requests would be made to the people who retain or maintain such records, and would not necessarily be brought to the attention of accounting officers. On the basis of these affidavits, although forecast materials may have been furnished to auditors employed by the Commission in the course of field examinations, if this was done it was not done pursuant to an official request or demand by the Commission and was not done with the authorization or knowledge of the responsible officers of the railroads.

Conclusions of Law

1. The Court has jurisdiction of the subject matter of this proceeding and of the parties thereto.

2. The issues to be resolved in this proceeding are (1) the extent of the authority of the Interstate Commerce Commission under Section 20(5) of the Interstate Commerce Act (49 U.S.C. § 20(5)) to secure documentary materials from a carrier subject to its jurisdiction, and (2) the applicability of Section 12(1) of the Act (49 U.S.C. § 12(1)) to the Formal Demand at issue in this proceeding.

3. There are no genuine issues of material fact with respect to plaintiff's motion for summary judgment.

4. Section 20(5) of the Interstate Commerce Act provides in pertinent part:

> FORMS OF ACCOUNTS, RECORDS, AND MEMORANDA; ACCESS TO RECORDS, ETC., BY COMMISSION OR AGENTS
>
> (5) The Commission may, in its discretion, prescribe the forms of any and all accounts, rec-

ords, and memoranda to be kept by carriers and their lessors, including the accounts, records, memoranda of the movement of traffic, as well as of the receipts and expenditure of moneys, and it shall be unlawful for such carriers or lessors to keep any accounts, records, and memoranda contrary to any rules, regulations, or orders of the Commission with respect thereto. The Commission or any duly authorized special agent, accountant, or examiner thereof shall at all times have authority to inspect and copy any and all accounts, books, records, memoranda, correspondence, and other documents, of such carriers, lessors, and associations and such accounts, books, records, memoranda, correspondence, and other documents, of any person controlling, controlled by, or under common control with any such carrier, as the Commission deems relevant to such person's relation to or transactions with such carrier. * * * Such carriers, lessors, and other persons shall submit their accounts, books, records, memoranda, correspondence, and other documents for the inspection and copying authorized by this paragraph, * * * to any duly authorized special agent, accountant, or examiner of the Commission, upon demand and the display of proper credentials.

5. Prior to the Transportation Act of 1920, which amended Section 20(5) to read as it now does, Section 20 of the Interstate Commerce Act provided in part:

> The Commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to this act, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of

> the Commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers. * * *

In *United States* v. *Louisville & N. R. Co.*, 236 U.S. 318 (1915), the Supreme Court concluded that the authority granted the Commission to inspect "accounts, records or memoranda" related to "accounts, records, and memoranda" kept in the bookkeeping system to be prescribed by the Commission (236 U.S. at 334). The Court specifically held that Section 20, as it then stood, did not authorize inspection of correspondence, even though certain correspondence may contain a record or be the only record of business transactions (236 U.S. at 334, 336).

6. Subsequent to the decision in the *Louisville & Nashville* case, the Commission recommended to Congress in its annual reports for 1915, 1916, and 1917:

> That that portion of Section 20 of the Act which accords the Commission rights of access to the acounts, records, and memoranda kept by carriers be amended so as to also accord right of access to the carriers' correspondence files.

In the Transportation Act of 1920, Congress amended what is now Section 20(5) by adding to the words "accounts, records, and memoranda," which defined the materials the Commission might inspect, the words "including all documents, papers, and correspondence." As shown by the House Hearings on H.R. 4378, 66 Cong. 1st Sess. (1919), p. 33, which became the 1920 Act, the purpose of this amendment was as follows:

> [Commissioner] Clark. * * * It will give the Commission the same access to the correspondence files of the carriers subject to its inspection as it now has with regard to accounts, records, and memoranda.

> The CHAIRMAN. Is that the result of the decision in the Louisville & Nashville case?
>
> Mr. CLARK. Yes. * * * It has developed in many instances that an understanding of transactions which appear on the books of a carrier, the true facts as to an expenditure and the justification for it under law, cannot be found unless the correspondence which passed in connection with it is reviewed.

7. In the *Louisville & Nashville* case, *supra,* at p. 333, the Supreme Court, construing Section 20 of the Act, held:

> Of course, this act, like other acts, may be read in the light of the purpose it was intended to serve and the history of its origin. We find, then, that in this section Congress has authorized the Commission to prescribe the forms of accounts, records, and memoranda, which shall include accounts, records, and memoranda of the movements of traffic, as well as the receipts and expenditures of money to which accounts, records, and memoranda the Commission is given access at all times.

The Supreme Court also held (236 U.S. at 335) that the "primary object to be accomplished was to establish a uniform system of accounting and bookkeeping, and to have an inspection thereof."

8. To bring the materials sought in the Formal Demand within the scope of amended Section 20(5), they would have to be deemed "other documents" within the meaning of that section, since these forecasts clearly are not "accounts, books, records, memoranda [or] correspondence." In the light of the Supreme Court's interpretation of Section 20 set forth in the *Louisville & Nashville* case, *supra,* and the legislative history surrounding the subsequent amendments to the Act, and the general context of the section, the Court concludes that the amendment of

Section 20(5) did not expand the inspection powers of the Commission to categories of documents not related to the prescribed or authorized accounting and corporate records of a carrier, and that the term "other documents" means other documents providing background material which would assist an auditor to understand an entry on the records prescribed by the Commission (see 49 C.F.R. Part 1201, General Instructions 1–3). Accordingly, Section 20(5) does not authorize the Interstate Commerce Commission to inspect the budget forecast materials described in the Formal Demand.

9. Section 12(1) of the Interstate Commerce Act, while conferring certain powers upon the Commission to secure information and to conduct investigations, does not make provision for inspection of documentary materials by Commission representatives; the authority for such inspections arises solely under Section 20. *United States* v. *Louisville & N. R. Co.*, 236 U.S. 318, 329–330 (1915). Neither the Formal Demand nor the counterclaim filed by the United States of America purport to rely on Section 12(1).

10. Since the Formal Demand for forecast materials was not within the authority conferred upon the Commission on its authorized representatives under Section 20(5), the counterclaim asserted by the United States of America, based on Sections 20(5), 20(7), and 20(9) fails to state a claim upon which relief can be granted.

11. In view of the foregoing findings of fact and conclusions of law, the Court finds it unnecessary to decide other issues discussed by the parties in their memoranda or in argument.

JANUARY 13th, 1971.

/s/ BARRINGTON D. PARKER,
Barrington D. Parker,
United States District Judge.

APPENDIX B

United States Court of Appeals for the District of Columbia Circuit

No. 71-1087

BURLINGTON NORTHERN, INC., ET. AL., APPELLEES

v.

INTERSTATE COMMERCE COMMISSION, MATTHEW PAOLO, DIRECTOR, BUREAU OF ACCOUNTS, AND THE UNITED STATES OF AMERICA, APPELLANTS

No. 71-1199

BURLINGTON NORTHERN, INC., APPELLANT

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

Appeals from the United States District Court for the District of Columbia

(Decided January 31, 1972)

Before WILBUR K. MILLER, *Senior Circuit Judge*, and TAMM and ROBB, *Circuit Judges*.

ROBB, *Circuit Judge:* Burlington Northern, Inc., a common carrier by railroad subject to the jurisdiction of the Interstate Commerce Commission, filed this action in the district court against the Commission and Matthew Paolo, Director of the Commission's Bureau of Accounts.[1] The complaint sought a declaration of

[1] W. N. Ernzen, Vice President—Finance of Burlington Northern, Inc., was originally a plaintiff but by stipulation of the parties was withdrawn from the action.

Burlington Northern's rights and injunctive relief against a formal demand for examination of records served upon the railroad by the Commission. The demand, upon the purported authority of section 20(5) of the Interstate Commerce Act, 49 U.S.C. § 20(5) (1970), called for the production for inspection and examination of Burlington Northern's 1970 and current budget forecasts, including cash flow and income forecasts, together with all related working papers and interpretative material. The commission filed an answer admitting the allegations of fact contained in the complaint and praying that the action be dismissed. The United States intervened, adopted the answer of the Commission, and counterclaimed. The counterclaim asked the court to order Burlington Northern to comply with the Commission's demand, and to assess against the railroad the statutory forfeiture of $500.00 for each day it continued its refusal to comply with the demand. Thereafter cross-motions for summary judgment were filed, supported by affidavits. Holding that the demand was not authorized by section 20(5) of the Interstate Commerce Act, the district court granted Burlington Northern's motion, dismissed the counterclaim, and denied the government's motion for summary judgment. *Burlington Northern, Inc. v. Interstate Commerce Commission,* 323 F. Supp. 273 (D.D.C. 1971). We affirm the judgment of the district court.

The facts appear in the pleadings and affidavits filed in the district court, and so far as material here, are not in dispute. The controversy had its origin in a hearing before the Subcommittee on Surface Transportation of the Committee on Commerce of the United States Senate. Prompted by the bankruptcy of the Penn Central Railroad the Subcommittee was considering legislation to provide financial assistance

to certain railroads. During the hearing on June 23, 1970 Senator Hartke told Commissioner Tuggle of the ICC that the Subcommittee needed a list of the railroads which were prospective applicants for loan guarantees. (A. 115) The following exchange then took place:

> Senator HARTKE. Let me ask you this: Do you or do you not now have a list of railroads which will in your opinion be asking for assistance under a loan guarantee bill of the type which is presently proposed for the Congress to consider?
>
> Mr. TUGGLE. Not in our opinion. But we can examine our records and see the railroads that are marginal or losing money. We formed no opinion about it yet, but we can easily evaluate the railroads that appear to be needing help.
>
> Senator HARTKE. In other words, you can provide for us relevant financial information about these railroads, showing their current financial condition, together with the financial forecasts made by the railroad.
>
> Can you do that?
>
> Mr. TUGGLE. We can show their financial condition according to our records. We can't give you the railroads' forecast.
>
> * * *
>
> Mr. TUGGLE. We don't know what their financial forecasts are. They don't file them with us.
>
> Senator HARTKE. Can you ask them for it?
>
> Mr. TUGGLE. We can do that.
>
> Senator HARTKE. And will you give us their reply?
>
> Mr. TUGGLE. Yes.
>
> Senator HARTKE. If they give you a financial forecast, give us that. If they refuse to give it to you, will you report that to us?
>
> Mr. TUGGLE. Yes, we would be glad to do that.
>
> * * *
>
> Senator HARTKE. * * * So I am going to ask you to do that and also give us, as soon as pos-

> sible, an estimate of the time in which you can give us the financial forecasts of the railroads.
>
> Mr. TUGGLE. Senator, let's get this straight. We write them and request it. They may write back and want to know more specifically what we want, things of that kind. That is completely beyond our control.
>
> Senator HARTKE. I am not saying it is within your control. But if they plan to come in and ask for money under this Act, I would think they would be in a position now to inform (?) the ones that are coming. (A. 115–119)

The government does not contend that Burlington Northern was a "marginal" railroad, likely to apply for a loan guarantee. Nevertheless, on July 17, 1970, Mr. Paolo wrote to Burlington Northern and other major railroads, referring to the request for financial forecasts, and stating:

> You are, therefore, requested to furnish information which we will pass on to the Senate Committee, concerning a financial forecast for your railroad including an income statement and a cash flow statement projected forward to December 31, 1970. (A. 134)

By letter of August 4, 1970 Burlington Northern responded to Mr. Paolo's request. The railroad's letter recited various contingencies and imponderable factors which precluded reliable predictions of the company's income and cash flow.[2] The letter concluded with the statement that Burlington Northern expected that its

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[2] Among the factors listed by Burlington Northern in the letter were the uncertainties of crop production and the ability of cars to move the harvest at the proper time, the action of Congress on legislation affecting the railroad industry, labor contract negotiations, Commission action on proposed rate increases, and uncertainties resulting because 1970 was the first year of merged operations for the Burlington Northern.

net income for 1970 "will be somewhat less than the pro forma earnings of the constituent companies, before special charges, for the year 1969" and that "by the end of 1970 cash will be down somewhat from the amounts on hand at the beginning of the year but still at a level adequate for working purposes." (A. 135)

On September 4, 1970 Mr. Paolo again wrote to Burlington Northern requesting information about the company's current dividend policies. He referred in particular to the railroad's 1970 dividend declarations, and asked for copies of the minutes of the meetings of the Board of Directors at which the dividends were declared, together with copies of all documents furnished members of the Board in their deliberation. He asked further for copies of Burlington Northern's cash flow and income forecasts for 1970 and 1971.

At a meeting with Mr. Paolo on September 25, 1970, representatives of the railroad explained the declarations of dividends and agreed to furnish all the material he had requested, except forecasts. Thereafter the company did furnish the requested material, except forecasts, and in addition offered to provide current financial data on a monthly basis.

On September 25, 1970 Mr. Paolo by letter repeated his request that Burlington Northern submit "actual pro forma-type statements detailing the items generally found in income and cash flow statements. * * *" (A. 136–37). He requested such statements for the last quarter of 1970 and projected income and cash flow statements for the full year 1970. When Burlington Northern declined to comply with this request the Commission served upon the railroad the "Formal Demand for Examination of Records" which is challenged by Burlington Northern in this action. The demand, purporting to be under the authority of sec-

tion 20(5) of the Interstate Commerce Act, called for inspection and examination of:

(1) Burlington Northern, Inc., 1970 budget forecast including but not limited to items pertaining to cash flow forecast and income forecast, together with associated working papers and interpretative material including but not limited to summarizations of any phase of the forecast.

(2) Burlington Northern, Inc. most current budget forecast including but not limited to items pertaining to cash flow forecast and income forecast, together with associated working papers and interpretative material including but not limited to summarizations of any phase of the foregoing forecast.

(3) Burlington Northern, Inc., all analyses, working papers, preliminary studies, interpretative material and summarizations presently on hand and in the making as subject matter for the next budget forecast of the nature indicated in (1) and (2) above.

(4) All documents showing variances between the Burlington Northern, Inc., budget forecasts and actual performance for each month and/or quarter of the calendar year 1970. (A. 40)

In conclusion, the demand directed the railroad's attention to section 20(7)(a) of the Interstate Commerce Act, 49 U.S.C. § 20(7)(a) (1970), providing that failure or refusal to comply subjects the railroad to a forfeiture of not to exceed $500.00 for each day of default. Burlington Northern declined to comply, and this action followed.

The Commission contends that its demand is authorized by section 20(5) of the Interstate Commerce Act, 49 U.S.C. § 20(5) (1970).[3] That section authorizes the

[3] Section 20(5) provides, in pertinent part:

"The Commission may, in its own discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers and their lessees, including the accounts, records, and

Commission to "prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers and their lessors, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys * * *." The Commission is further authorized "to inspect and copy any and all accounts, books, records, memoranda, correspondence, and other documents of such carriers, lessors, and associations * * *."

The Commission argues that under section 20(5) it may demand budget, cash flow and income forecasts pursuant to its authority to inspect "memoranda, correspondence, and other documents" of the railroads. This construction of section 20(5) would give the Commission under that section general investigatory powers not necessarily related to the Commission's authority to prescribe the forms of accounts and records. It would extend the scope of section 20(5) to

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memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys, and it shall be unlawful for such carriers or lessors to keep any accounts, records, and memoranda contrary to any rules, regulations, or orders of the Commission with respect thereto. The Commission or any duly authorized special agent, accountant, or examiner thereof shall at all times have authority to inspect and copy any and all accounts, books, records, memoranda, correspondence, and other documents, of such carriers, lessors, and associations, and such accounts, books, records, memoranda, correspondence, and other documents, of any person controlling, controlled by, or under common control with any such carrier, as the Commission deems relevant to such person's relation to or transactions with such carrier. * * * Such carriers, lessors, and other persons shall submit their accounts, books, records, memoranda, correspondence, and other documents for the inspection and copying authorized by this paragraph, * * * to any duly authorized special agent, accountant, or examiner of the Commission, upon demand and the display of proper credentials." 49 U.S.C. § 20(5) (1970).

give the Commission unlimited access to all the papers and documents of the railroad relating even remotely to the regulatory interests of the Commission.

Burlington Northern on the other hand contends that the inspection provided by section 20(5) must be limited to the prescribed or authorized accounting and corporate records of the carrier, and to the correspondence, memoranda, and other documents providing background or explanatory material which would assist an auditor in understanding entries in those records. Projections and internal forecasts, according to Burlington Northern, may not be inspected under section 20(5) because they do not relate to or explain historical or current records over which the Commission has regulatory power. The district court agreed with Burlington Northern. We think the district court was right.

Since the answer to the problem confronting us is not apparent on the face of the statute, we turn to its legislative history and background.

Section 20 of the Act of February 4, 1887, 24 Stat. 386–87, authorized the Interstate Commerce Commission to require annual reports from all common carriers subject to its jurisdiction, and to prescribe uniform methods of keeping the carriers' accounts. Section 20 was amended by section 7 of the Hepburn Act of 1906, 34 Stat. 593–95, to provide among other things that the "Commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to this Act. . . ." 34 Stat. 594 (1906). As stated in the House Report on the bill, submitted by Mr. Hepburn, the purpose of the bill was to enlarge the power of the Interstate Commerce Commission to remedy the evils of rebates and other forms of discrimination in rates practiced by the

carriers.[4] H.R. Rep. No. 591, 59th Cong., 1st Sess. 2 (1906).

The Twenty-Seventh Annual Report of the Interstate Commerce Commission, dated December 15, 1913, recommended that the provisions of section 20 relating to the compulsory production of papers and records of the carriers be further amended. The report noted:

> Another particular in which the year's experience demonstrates that the terms of the act need to be made more certain, relates to the language of section 20 requiring carriers to give representatives of the Commission access to their "accounts, records, and memoranda." While carriers generally have shown a commendable frankness in exhibiting all of their files to the agents of the Commission, there have recently been instances where a carrier has refused access to certain of its correspondence files on the ground that they were not properly to be considered as "accounts, records, or memoranda." The work of detecting and prosecuting many of the ingenious devices for rebating and otherwise violating the law has been greatly facilitated in the past by the fact that representatives of the Commission were

[4] With respect to the amendment of section 20 the Report states in part:

"Section 7 is an amendment of section 20 of the act of 1887, and gives the Commission additional power with regard to reports from all common carriers, subject to the law, and to prescribe the manner in which such reports shall be made and the subject-matter of the report, and provides a penalty for failure to obey such requirements. It also gives the Commission power, in its discretion, to prescribe the form of accounts, records, and memoranda to be kept by carriers, and that the Commission shall at all times have access to *such* records and books and other accounts to be kept." H.R. Rep. No. 591, 59th Cong., 1st Sess. 5–6 (1906) (emphasis supplied).

> authorized to examine the correspondence relating to questionable transactions which was to be found in the files of the carriers. * * * For this reason additional legislation making explicit and certain the authority of the Commission to examine all correspondence files, indexes, and other papers and documents retained by carriers subject to the act is desirable if the many violations of the act which can be disclosed only by access to these papers are to be effectually discouraged. Twenty-Seventh Annual Report of the Interstate Commerce Commission 13–14 (1913).

This recommendation was repeated in the Twenty-Eighth Annual Report of the Interstate Commerce Commission, Part I, 65 (1914).

It is plain that the purpose of the Commission in recommending this amendment was only to gain access to correspondence relating to violations of the Act by carriers; it was not intended to permit the examination of correspondence of every nature.

On February 23, 1915 the Supreme Court held that the authority of the Commission under section 20 to examine the accounts, records and memoranda of carriers did not extend to the correspondence sent to or received by the railroads. *United States* v. *Louisville & Nashville Railroad Company,* 236 U.S. 318 (1915). The Court confined the Commission's power of compulsory inspection to narrow limits, saying:

> There is nothing from the beginning to the end of the section to indicate that Congress had in mind that it was making any provisions concerning the correspondence received or sent by the railroad companies. The primary object to be accomplished was to establish a uniform system of accounting and bookkeeping, and to have an inspection thereof. If it in-

> tended to permit the Commission to authorize examiners to seize and examine all correspondence of every nature, Congress would have used language adequate to that purpose. A sweeping provision of that nature, attended with such consequences, would not be likely to have been enacted without probable exceptions as to some lines of correspondence required to be kept open and subject to inspection upon demand of the agents of the Government. 236 U.S. at 335–36.

The Court noted that a broad construction of section 20 might include confidential correspondence between a railroad and its counsel, and might raise constitutional questions; but, said the Court:

> How far such a demand as embodied in this petition can be permitted within the constitutional rights set up by the defendant, we do not need to consider, as we do not think that the section of the act of Congress under which the demand was made authorizes the compulsory submission of the correspondence of the company to inspection. It is true that correspondence may contain a record, and it may be the only record of business transactions, but that fact does not authorize a judicial interpretation of this statute which shall include a right to inspection which Congress did not intend to authorize. 236 U.S. at 336.

The *L & N* decision demonstrates the Court's reluctance to extend the investigatory power of the Commission beyond the limits fixed by a narrow reading of the statute. 236 U.S. at 334. The Court held that the purpose of section 20 was to establish a uniform system of accounting and bookkeeping, not to grant unlimited power of inspection to the Commission.

Responding to the decision in the *L & N* case Congress in the Transportation Act of 1920, 41 Stat. 456 (1920), amended section 20 to read:

> The Commission shall at all times have access to all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, and kept or required to be kept by carriers subject to this Act. * * * 41 Stat. 493 (1920).

The House Report accompanying the bill (H.R. Rep. No. 456, 66th Cong., 1st Sess. 30) explained that section 20 was amended:

> so as to include, within the provisions relating to the keeping of accounts and the prohibition against destroying or mutilating them, all documents, papers, and correspondence required to be kept by the carriers. This amendment is necessary in view of the decision of the Supreme Court that existing law does not authorize the commission to examine correspondence.

Although the amendment of 1920 brought certain materials within the reach of the Commission, it did not alter the basic design and purpose of section 20 as interpreted by the Supreme Court. The investigatory powers exercised by the Commission under that section were still required to relate to the maintenance of a uniform system of accounts, and to the explanation or understanding of required accounting entries.

The Transportation Act of 1940, 54 Stat. 917 (1940), once again amended the relevant language of section 20 as follows:

> The Commission or any duly authorized special agent, accountant, or examiner thereof shall at all times have authority to inspect and copy any and all accounts, books, records, memo-

> randa, correspondence, and other documents, of such carriers and lessors, and such accounts, books, records, memoranda, correspondence, and other documents, of any person controlling, controlled by, or under common control with any such carrier, as the Commission deems relevant to such person's relation to or transactions with such carrier.

This provision is phrased in more sweeping terms than its 1920 counterpart, but we think it was not intended materially to broaden the Commission's investigatory power which had existed under the 1920 version of the statute. Rather, the motivation for amending the section in 1940 was to permit the Commission to inspect and copy accounts, records, and explanatory materials of controlling, controlled, or jointly controlling persons in a manner similar to the inspection afforded in the case of regulated carriers. H.R. Rep. No. 2016, 76th Cong., 3rd Sess. 67 (1940);[5] H.R. Rep. No. 2832, 76th Cong., 3rd Sess. 73 (1940) (Conference Report). The amendment did not alter the limited function and purpose of section 20 as defined by previous statutes and by the Supreme Court.

From this analysis of the history of section 20 we conclude that the Supreme Court's narrow construction of the purpose of the section is still controlling

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[5] H.R. Rep. No. 2016, 76th Cong., 3rd Sess. 67 (1940), states: "The conference substitute amends section 20 of the Interstate Commerce Act which relates to accounts, records, reports, etc., of carriers subject to part I. The principal change is that which gives the Commission or its agents authority to inspect and copy accounts, books, records, memoranda, correspondence, and other documents of any person controlling, controlled by, or under common control with any such carrier, as the Commission deems relevant to such person's relation to or transactions with such carriers."

despite the 1920 and 1940 amendments. That purpose is to maintain a uniform accounting system and to permit the analysis and interpretation of records which are required to be kept by carriers. The Commission's access to memoranda and other materials in the possession of carriers must therefore be confined to circumstances in which the need for information relating to or explanatory of required accounting and bookkeeping entries is evident. The Commission's powers of inspection are focused upon facts and historical data as reflected in the records; they do not extend to projections or predictions of future events which have no apparent relevance to the understanding or evaluation of accounting and bookkeeping entries. The budget and income forecasts demanded by the Commission here relate to events which might or might not occur in the future, as distinguished from facts and past events recorded in the books and records of the carriers. Such prognostications are not within the limited scope of the Commission's power of inspection under section 20. Accordingly, the judgment of the district court is

Affirmed.

APPENDIX C

United States Court of Appeals for the District of Columbia Circuit

No. 71-1087

BURLINGTON NORTHERN, INC., ET AL., APPELLEES

v.

INTERSTATE COMMERCE COMMISSION, MATTHEW PAOLO, DIRECTOR, BUREAU OF ACCOUNTS, AND THE UNITED STATES OF AMERICA, APPELLANTS

On Appellants' Suggestion for Rehearing En Banc

(Filed May 17, 1972)

Before BAZELON, *Chief Judge,* and WRIGHT, MCGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, *Circuit Judges.*

Order

On consideration of appellants' suggestion for rehearing *en banc,* it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam.

Circuit Judge McGowan took no part in the consideration or disposition of the suggestion for rehearing en banc.

Statement of Circuit Judge Leventhal, in which Chief Judge Bazelon, and Circuit Judges Wright and Robinson join, as to Why He Would Grant Suggestion for Rehearing En Banc.

The suggestion of the Interstate Commerce Commission (ICC) for rehearing en banc fails because not favored by five active judges. One judge is not voting. This is a memorandum of the view of four judges that the panel decision should be vacated and the matter subjected to further review.

Looking at the question broadly and prima facie, it seems to us likely that the ICC has authority to conduct an investigation when railroads are paying out dividends in excess of current earnings, and to examine the carriers' income and cash flow forecasts—at least where, as here, there is a context of proposals under consideration for legislation to make available loan guarantees to the railroad industry as one beset by financial strains.[1] We do not say that the authority may be exercised routinely. The items involved are internal papers that stand at the heart of management effort, and so long as our carrier operations are rooted in private enterprise there is a strong element of privacy in such items. That is, however, a reason for limiting the occasion of such production—by agency or

[1] On July 17, 1970, subsequent to a Senate Committee hearing, the ICC requested forecasts from 73 major railroads; 37 roads furnished the requested information; the others did not. In August 1970, it became public that Burlington had continued its dividend of $8,615,000 in the second quarter, as in the first quarter, notwithstanding a substantial loss in the first quarter, the first in 10 years, and earnings in the second quarter of only $4,547,000. The September 4, 1970, letter of the Director of ICC's Bureau of Accounts noted his concern over the adverse impact of the dividend declarations on the company's working capital and cash position, and made the request for information identified in the panel opinion, including a request for the company's "plans to pay debt obligations coming due." The Company expressly declined to furnish forecasts of income and cash flow, and transmitted opinion of counsel that the company was not required to furnish such information to the ICC.

judicial limitation—and for forbidding its disclosure outside the agency except under careful conditions subject to court review. It is not a basis for a decision finding the ICC totally without power to call for and study such critical documents.

Hence a question may have to be faced as to whether and to what extent such information may be required for the purpose of transmittal to a legislative committee. However, it is in general a factor supporting latitude of investigation by a regulatory commission that it is intended to add flexibility to the implementation of legislative policy, and to make investigations of abuses and problems that may call in part for use of existing administrative authority and in part for new legislation.

Looking at the question as a technical issue of statutory construction, we note that the panel relies on Justice Day's opinion in United States v. Louisville & Nashville, 236 U.S. 318 (1915), as giving a narrow reading to § 20(5) of the Interstate Commerce Act, as added by the 1906 Hepburn Act. The Court held that there was no right to demand production of correspondence.

We have these comments: (1) the 1915 interpretation served to avoid constitutional doubts presented by the Court's then views as to the extent of the protection of the Fourth Amendment against compulsory production of corporate documents. See FTC v. Am. Tobacco, 264 U.S. 298, 306 (1924) ("fishing expeditions"). But those constitutional doubts no longer exist. See United States v. Morton Salt, 338 U.S. 632, 637 (1950). The removal of the constitutional doubts opens up the propriety of the interpretation of the statute in accordance with its terms. This point was not only noted in this court's opinion in Montship Lines Ltd. v. FMB, 111 U.S.App.D.C. 160, 295 F.2d 147 (1961), but was

developed last Term in Griffin v. Breckenridge, 403 U.S. 88, 95–96 (1971), where Justice Stewart wrote for a unanimous Court in reversing the restrictive interpretation given 42 U.S.C. § 1985(3) in 1951, that it reached only conspiracies under color of state law. In 1971 Justice Stewart wrote that since the constitutional problems that concerned the Court in 1951 had been dissipated by subsequent opinions, there was no reason to deny the words of the statute their apparent meaning as applicable to all conspiracies, including private conspiracies, to deprive persons of their Federal rights.

(2) Congress specifically rejected the 1915 *Louisville & Nashville* decision in the 1920 amendment of § 20, which spells out that the ICC right of access "to all accounts, records, and memoranda" includes "all documents, papers, and correspondence now or hereafter existing and kept or required to be kept by carriers subject to this act."

As to "correspondence," this plainly undercuts Justice Day's reliance that the Hepburn Act wording had not gone so far as to refer expressly to "correspondence."

More important for present purposes, the 1920 wording makes clear that § 20 governs documents that are "kept" whether or not "required to be kept." This is significant in view of Justice Day's comment that the Hepburn Act's purpose was to allow the ICC to prescribe the forms of accounts, record, and memoranda to be kept by carriers, which it is given access at all times, after which he added: "The railroads are not allowed to keep any other than those prescribed by the Commission." 236 U.S. at 333. And he noted that the ICC was surely not authorized to prescribe the forms of correspondence, see 236 U.S. at 334.

The change in wording to cover memoranda including documents and correspondence actually kept whether or not required to be kept was part of the Transportation Act of 1920, a thoroughgoing revision of the ICC laws which expanded enormously the responsibilities of the ICC for the integrity and balance of the transportation system.

(3) Finally, it is not certain whether the *Louisville & Nashville* opinion, in prohibiting compulsory production of correspondence, necessarily prohibits compulsory production of earning forecast memoranda. The Court reserved the possibility that the Hepburn Act was broad enough to authorize an inspection of accounts, records and memoranda for which no form has been prescribed by the Commission (235 U.S. at 334).

* * * * *

The question is important, and the panel decision is so doubtful that we think it should be vacated and reconsidered en banc.

APPENDIX D

United States Court of Appeals for the District of Columbia Circuit, September Term, 1971

Civil 3471–70

No. 71–1087

BURLINGTON NORTHERN INC., ET AL., APPELLEES

v.

INTERSTATE COMMERCE COMMISSION, MATTHEW PAOLO, DIRECTOR, BUREAU OF ACCOUNTS, AND THE UNITED STATES OF AMERICA, APPELLANTS

No. 71–1199

BURLINGTON NORTHERN INC., APPELLANT

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

Appeals from the United States District Court for the District of Columbia

Before: WILBUR K. MILLER, *Senior Circuit Judge*, and TAMM and ROBB, *Circuit Judges*.

Judgment

(Filed January 31, 1972)

These cases came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and were argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED by this Court that the judgment of the District Court appealed from in case 71–1087 is hereby affirmed, and it is

FURTHER ORDERED AND ADJUDGED by this Court that case 71–1199 is hereby dismissed as moot.

Per Curiam.

Dated: JANUARY 31, 1972.

Opinion by Circuit Judge ROBB.

APPENDIX E

Carrier	Date	Records requested	Reason for request	Reason given for denial of request
1. Atchison, Topeka & Santa Fe Railroad Company.	7/14/71	Budgets, cash forecast, forecast estimated revenues, and expenses.	To evaluate the effect of intercompany transactions on carrier; to determine its source and application of funds; to make a financial audit of carriers' financial position.	Burlington Northern decision.
2. B&O Railroad	2/71	Budgets	To verify carrier's accounting for equalization of maintenance costs.	Burlington Northern decision.
3. Chicago, Rock Island and Pacific Railroad.	2/1/72	Budgets, forecast of revenues, and expenses, cash flows.	To make financial audit and prepare report on financial stability of carrier; to review source and application of funds.	Partially refused—given access to some—balance refused based on Burlington Northern decision.
4. Delaware & Hudson Railway Company.	1/24/72	Budgsts, forscasts, data on savings resulting from elimination of passenger service.	To examine the financial condition of the carrier.	Burlington Northern decision.
5. Erie-Lackawanna R. Co.	12/71	Cash, source and application of funds, income, and capital expenditure budgets	To examine the financial condition of the carrier.	Burlington Northern decision.
6. Grand Trunk Western R.R.	4/17/72	Budgets for 1972, projected cash flow, financial forecast, and schedules.	To review anticipated income and expenditures in preparing financial analysis of carriers' financial position; to analyze source and application of funds.	Privileged information.
7. Gulf, Mobile & Ohio R.R. Company.	3/17/71	Cash flow projections, budget forecast	To prepare financial analysis and forecast of railroad's operation.	Burlington Northern decision.
8. Illinois Central Railroad	12/23/71	Budgets and forecast of revenues and cash flows.	To aid in making audit of carrier's financial position.	Burlington Northern decision.
9. Kansas City Southern	2/8/72	Budgets, forecast, and estimated revenues	To review the financial position of the carrier.	Burlington Northern decision.

COPY

Carrier	Date	Records requested	Reason for request	Reason given for denial of request
10. Lehigh & Hudson River Railway Co.	3/17/72	Cash forecasts and budgets	To examine the financial condition of the carrier.	Burlington Northern decision.
11. Louisville & Nashville Railroad	9/27/71	Cash flow projections, budget forecasts	To review expected expenditures and cash needs, sources of funds; and evaluate railroad's financial condition.	Burlington Northern decision.
12. Missouri-Kansas-Texas Railroad Co.	3/27/72	Expense budgets, revenues estimates, projected cash flow, and projected profit and loss statements.	To aid in forecasting carrier's future financial needs and in making audit of financial condition.	Burlington Northern decision.
13. Missouri Pacific Railroad-Texas & Pacific Railway.	2/22/72	Budgets, estimates and other projected financial data.	To aid in making financial audits of carriers' financial position.	Burlington Northern decision.
14. Pennsylvania Company	1/72	Financial statements of subsidiary companies, forecasts and correspondence relating to sale of Penneo stock to bank creditors of PTC.	To review proposed sale of Pennsylvania Company by PTC and evaluate Pennsylvania Company's net worth.	Subsidiary companies are not subject to IC Act. References made to Burlington Northern decision by company official in discussions with auditor.
15. Soo Line Railroad	2/72	Budgets, both capital and operating, projected cash flow, and other financial forecast.	To review anticipated income and expenditures in preparing financial analysis of carrier's financial position.	Burlington Northern decision.
16. Southern Pacific Ry. Co.	3/72	Minutes and general records of non-carrier affiliates.	To review transactions and relationships between carrier and affiliated companies; subsequently non-carrier records were made available except for forecasts.	Companies not subject to IC Act and Burlington Northern decision.
17. Texas Gas Transmission Corp.	5/11/71	Cash flow projections budget forecast	To review management's analysis of and forecast of cash demands to be made of its subsidiaries that are regulated carriers.	Burlington Northern decision.

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